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SEP 1

No. 138

In the Supreme Court of the United States

OCTOBER TERM, 1960

WILLIAM Z. FOSTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
J. WALTER YEAGLEY,
Assistant Attorney General,
KEVIN T. MALONEY,
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OPINIONS BELOW

The opinion of the court of appeals (Pet. 32–36) has not yet been reported. The opinions of the district court (R. 3a–5a)[1] are not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 1960. The petition for a writ of certiorari was filed on June 10, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] "R." refers to the printed appendix in the court of appeals which has been filed with the Clerk of the Court.

QUESTIONS PRESENTED

1. Whether the district court's orders denying
tioner's motions to dismiss indictments and the o
tunity to travel outside the United States are ap
able as final decisions within the meaning of 28 U
1291.

2. Whether the refusal to dismiss indictment
turned in 1948, on which petitioner has not yet
tried only because of his ill health, violates an
his constitutional rights.

3. Whether the district court's denial of petitio
motion to travel was constitutional and a reaso
exercise of its discretion.

STATUTE INVOLVED

The statute involved is 28 U.S.C. 1291, which
forth at page 3 of the petition.

STATEMENT

Indictment C. 128-87, was filed on July 20,
in the Southern District of New York, charging
tioner and eleven other defendants with con
ing to organize the Communist Party of the U
States to teach and advocate the overthrow o
government of the United States by force and
lence, and with further conspiring to teach and
vocate the duty and necessity of overthrowing
government of the United States by force and
lence. This indictment alleged a violation of Se
2 of the Smith Act, 54 Stat. 671 (now 18 U.S.C. 2

[1] This is the same indictment which was involved in *
United States, 341 U.S. 494.

Indictment C. 128-88 (R. 2), which also was filed on July 20, 1948, charged petitioner with membership in an organization advocating overthrow of the government of the United States by force and violence in violation of Section 2 of the Smith Act, 54 Stat. 671 (now also 18 U.S.C. 2385). After petitioner pleaded not guilty to both indictments on July 20, 1948, the district court denied the defendant's motions to dismiss the indictments and the government's motion to consolidate the conspiracy and the membership indictments (R. 15).

On November 1, 1948, when the case was called for trial, petitioner's counsel submitted a letter from his physician stating that he was too ill to stand trial (R. 507). The court then appointed two physicians to examine him. On November 8, 1948, petitioner and his co-defendants moved for a continuance of ninety days, based, in part, upon petitioner's illness (R. 508). The United States Attorney stated that he would be prepared to proceed to trial on Indictment C. 128-87 on January 17, 1949, "with or without Foster" (R. 511). On January 18, 1949, Judge Medina granted petitioner's motion for severance on the ground that a report by the court-appointed physicians indicated petitioner was too ill to stand trial.

The trial of the remaining defendants, the defendants in the *Dennis* case, began on January 17, 1949. During the trial the deposition of petitioner was read

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* Separate membership indictments and the two remaining co-defendants in the conspiracy case

into the record revealing his position as national chairman of the Communist Party and his active leadership in the activities which formed the basis for the convictions of the co-defendants (R. 222–796).

Subsequent to the trial of the *Dennis* case, the government has moved periodically for the physical examination of petitioner by the court-appointed physicians to determine whether he was able to proceed to trial (R. 55, 86, 104). Petitioner was examined pursuant to court orders dated October 30, 1952 (R. 70), April 2, 1954 (R. 101), and October 13, 1955 (R. 110). Following each of these examinations, the district court found that as of each of those times the petitioner was too ill to undergo the strain of a trial (R. 72–82, 113–119). On May 25, 1953, the court continued the case *sine die* (R. 83). On March 14, 1956, the government moved to set a trial date for the membership indictment (R. 129–135), but the motion was denied the following month (R. 132).

At petitioner's arraignment on July 20, 1948, the court fixed bail in the amount of $5,000 to cover both indictments and released petitioner in the custody of his attorney until the following day. Petitioner furnished bail on July 21, and he has been enlarged on bail ever since. The bail recognizance, in accordance with the standard form used in the Southern District of New York, provided that Foster could "not depart the jurisdiction of the court without leave." Petitioner has from time to time received extensions of his bail limits to travel outside the Southern District of New York (R. 513–515, 516–518). See *United States* v. *Foster*, 79 F. Supp. 422 (S.D. N.Y.).

On June 16, 1959, petitioner moved for an order dismissing the indictments or in the alternative for an order extending his bail limits to permit travel to the Union of Soviet Socialist Republics (R. 142). An accompanying affidavit of his personal physician, Dr. Harry Epstein, alleged that petitioner suffered a "cerebro vascular accident" in October 1957, and that, although some improvement had taken place, paralysis persisted (R. 154-155). Dr. Epstein advised that in his opinion petitioner was undergoing emotional strain as a result of the indictments, that "a greater degree of improvement could be obtained" in a warm climate, that the cost of treatment in the United States would be beyond petitioner's means, and that petitioner believed such treatment could be obtained at a lower cost in the U.S.S.R. (R. 153).

The district court denied the motion on the ground that the delay in trial was occasioned by the petitioner's ill health and not by the government, and that there was no denial of his constitutional right to a speedy trial. The application for an extension of bail limits was denied with leave to renew upon obtaining the consent of the surety (R. 167).

On September 8, 1959, petitioner obtained the consent of the surety (R. 186, 206) and renewed his motion to extend his bail limits to the U.S.S.R. or, in the alternative, to Czechoslovakia (R. 180, 197). Petitioner attached to his motion papers invitations he had received to come to those countries and obtain free medical care (R. 209, 210, 217). Petitioner's attorney alleged that the cost of medical care in the United States was beyond petitioner's means

(R. 185) and Dr. Epstein restated the opinion submitted on the former motion (R. 204). The district court denied the motion (R. 218-219), holding that petitioner's showing of a need to go to Russia or Czechoslovakia was inadequate and that, in view of the lack of extradition or judicial process, petitioner's allegations did not outweigh the government's interest in insuring his presence in the jurisdiction. The court of appeals affirmed, holding that the order refusing to dismiss the indictment was interlocutory and not appealable, and that the order denying petitioner's right to travel to Eastern Europe was within the area of its proper discretion.

ARGUMENT

I. *Our* The court below was correct in dismissing petitioner's appeal from the district court's denial of the motion to dismiss the indictment on the ground that it is interlocutory and not appealable under 28 U.S.C. 1291. It is well settled that a "judgment is final for the purpose of appeal 'when it terminates the litigation * * * on the merits' and 'leaves nothing to be done but to enforce by execution what has been determined.'" *Berman* v. *United States*, 302 U.S. 211, 212-213. Such a final judgment in a criminal case means conviction and sentence. *Id.* at 212; *Heike* v. *United States*, 217 U.S. 423, 429. Applying these principles to the dismissal of an indictment where a new indictment had been returned, this Court has held that it was "but an interlocutory step in the prosecution, and its review must await the conclusion of the 'whole matter litigated' between the Govern-

ment, and the petitioner—namely "the right to convict the accused of the crime charged in the indictment." *Parr* v. *United States*, 351 U.S. 513, 518-519. *A fortiori*, the refusal of the district court here to dismiss the indictments constituted but an interlocutory step in the prosecutions. The courts of appeals have repeatedly held that denials of motions to dismiss the indictment are not appealable orders. *E.g.*, *United States* v. *Triplitt*, 202 F. 2d 60 (C.A. 3); *Kyle* v. *United States*, 211 F. 2d 912 (C.A. 9); *United States* v. *Goldon*, 239 F. 2d 877 (C.A. 2).

Petitioner contends (Pet. 12-15) that the particular order denying his motion to dismiss should be made an exception to the rule that judicial determinations are not appealable prior to conviction and sentence. This argument is based on his own supposition that the case can never be tried, presumably because he anticipates that his health will never improve to the point where he would be ordered to trial. But neither of the courts below made such a finding. Rather, petitioner has merely been found to be unable to stand trial at the time the examinations were made (see R. 132).[*] And in *Greenwood* v. *United States*, 350 U.S. 366, 375, this Court held that, even though "there may be little likelihood of recovery" from mental illness so as to allow the accused to be tried, the power to prosecute for federal offenses is not exhausted. Similarly here, while there is no certainty that petitioner will be tried, the medical evidence of

[*] Petitioner has not asked for another examination by a court-appointed physician.

permanent disability for trial is not clear and the courts below have not found that petitioner will never be tried.

In any event, the circumstances of petitioner's health are immaterial to a determination of the appealability of the instant order. *Ad hoc* inquiry into the particular facts underlying every order denying a motion to dismiss to determine the likelihood of that order having a final effect would defeat the very purpose of the "finality" rule. As this Court held in *Carroll* v. *United States*, 354 U.S. 394, 405, appealability of an order depends upon the category into which the order falls, not on the facts of a particular case. This remains so even when the interlocutory order happens to be "of grave importance to a litigant" and is "never satisfactorily reviewable." *Id.* at 406. In other words, the crucial question is whether the kind of order necessarily or in the generality of cases has a final effect. Clearly an order denying a motion to dismiss an indictment does not necessarily or generally have the final effect which petitioner claims the instant order will have.

(*b*). Petitioner urges that the continued pendency of the indictments deprives him of due process (Pet. 16), imposes punishment without judicial trial (Pet. 17), imposes cruel and unusual punishment (Pet. 19), and violates his right to a speedy trial (Pet. 21). In fact, however (even assuming that these issues are properly appealable in this posture of the case), petitioner has not been punished or otherwise deprived of any of his constitutional rights.

The government brought this prosecution as an exercise of its legitimate powers to prosecute for federal crimes. Petitioner was indicted for violations of the Smith Act along with eleven co-defendants, all of whom were convicted in the trial of the *Dennis* case. The obvious purpose of the indictments, now as always, is to bring petitioner to trial on the charges at such time as his health may permit.[5] The existence of such criminal charges against a defendant is not punishment in any constitutional sense. Cf. *Trop* v. *Dulles*, 356 U.S. 86, 96; *Kong Yue Ting* v. *United States*, 149 U.S. 698, 730. "Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship." *Cobbledick* v. *United States*, 309 U.S. 323, 325. And as the *Greenwood* case makes clear (see *supra*, p. 7), the power of the government to prosecute is not exhausted at least until the impossibility of the defendant's standing trial is a medical certainty.

Petitioner's additional point that the indictments should be dismissed on the ground that he has been denied a speedy trial is plainly without merit. The right to a speedy trial is in the nature of a privilege which enables the accused, if he so chooses, to obtain a trial without unnecessary delay. But a defendant

[5] Petitioner's suggestion (Pet. 18) that the government's reason for refusing to dismiss the indictment is that it is trying to encroach upon his First Amendment rights is completely without factual basis. See the full text of the letter (R. 171) relied on by petitioner in connection with this argument, which is set forth in the Appendix, *infra*, pp. 15-17.

may for a multitude of reasons relinquish his right to a speedy trial and even seek delay, perhaps with the hope that he may avoid trial altogether. Here, by moving for a continuance and opposing the government's efforts to bring him to trial, petitioner has chosen to put off the trial and not to exercise his privilege of obtaining a speedy trial. Having made this choice and having been successful in obtaining a protracted continuance for his own benefit, he may not now obtain a dismissal of the charges against him because of "a delay which is attributable primarily to his own acts or to which he has consented." *United States* v. *Lustman*, 258 F. 2d 475, 477 (C.A. 2), certiorari denied, 358 U.S. 880; see, *e.g.*, *D'Aquino* v. *United States*, 192 F. 2d 338, 349–350 (C.A. 9), certiorari denied, 343 U.S. 935; *Fouts* v. *United States*, 253 F. 2d 215, 217–218 (C.A. 6).

Even assuming that petitioner, as he contends (Pet. 21–22), has not waived his right to a speedy trial, there can be no doubt that the government has been diligent in its efforts to bring the case to trial. The government has moved three times subsequent to the trial of the other *Dennis* defendants for the physical examination of petitioner by court-appointed physicians to determine whether he was able to stand trial. The situation is thus unlike *United States* v. *Provoo*, 17 F.R.D. 183 (D. Md.), affirmed, 350 U.S. 857, and other cases relied on by petitioner (Pet. 22), since the delay was not occasioned "by the deliberate act of the government". *Id.* at 201.

2. Petitioner contends (Pet. 23–25) that he is being unconstitutionally deprived of his right to travel since he will never be able to stand trial and, since, therefore, the government has only an "illusory" interest in his continued presence in the jurisdiction. The court of appeals, however, concluded that the district court's denial of petitioner's motion for leave to travel was within the bounds of its proper discretion, and there is no occasion for this Court to review that determination.

(*a*). While the majority of the court of appeals considered petitioner's claims as to his right to travel on their merits—and rejected them—we submit, initially, that the district court's order was not appealable. While it is clear that orders concerning bail conditions are in general interlocutory, this Court in *Stack* v. *Boyle*, 342 U.S. 1, allowed such an appeal. The language of the decision, however, strongly suggests—as Judge Friendly stated in his concurrence below—that appeal is allowable only in exceptional circumstances where a constitutional issue is involved (such as bail which is so excessive as to be invalid under the Eighth Amendment) and not merely the exercise of the district court's discretion: "As there is no discretion to refuse to reduce excessive bail, the order denying the motion to reduce bail is appealable as a 'final decision' * * *." *Id.* at 6. Moreover, sub-

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The majority below conceded that its position constituted an extension of this Court's decision in *Stack* v. *Boyle*, 342 U.S. 1 (allowing an appeal on the issue of excessive bail), but thought that the order was appealable where the appellant claims "an arbitrary exercise of discretion" (Pet. 34).

sequently in *Carroll* v. *United States*, 354 U.S. 394, 403, the Court again indicated that *Stack* v. *Boyle* was intended to apply only to rare cases by emphasizing that it was "the only decision of this Court" in which any order in a pending criminal case was found to be sufficiently independent from the main cause of the prosecution to be appealable.

As we show below, petitioner's constitutional claim that a person under an indictment has a right to travel is without merit and all that is involved here is the proper exercise of the district court's discretion. In these circumstances, petitioner's contentions do not raise the important constitutional issue justifying what would otherwise be an interlocutory appeal.

(*b*). The general right to travel, held by this Court in *Kent* v. *Dulles*, 357 U.S. 116, to be part of the liberty protected by the due process clause, is, like other such rights, subject to valid restrictions. See *Worthy* v. *Herter*, 270 F. 2d 905, 909 (C.A.D.C.), certiorari denied, 361 U.S. 918. It is well recognized that in order to satisfy the purpose of bail—to insure "the presence of the accused when required" (*United States* v. *Malcolm*, 155 F. 2d 1002, 1004 (C.A. 2); see *Stack* v. *Boyle*, *supra*, 342 U.S. at 5)—a district court may, in the exercise of its discretion, impose territorial limits on the bailee's right to travel. See, *e.g.*, *Reynolds* v. *United States*, 80 S. Ct. 30; *United States* v. *Craft*, 162 F. Supp. 578 (S.D. W. Va.); *United States* v. *Fos-*

ter, 79 F. Supp. 422 (S.D.N.Y.). In the *Kent* case itself, the Court emphasized (357 U.S. at 130): "We must remember that we are dealing here with citizens who have neither been accused of crimes nor found guilty." Here petitioner has been accused of crime (his co-defendants have been found guilty), and his right to travel was restricted to insure his presence at trial.

Petitioner's claim that the bail condition limiting his travel is not related to insuring his availability for trial because he never will be well enough to stand trial ignores the fact that no such finding has ever been made. Rather, petitioner has been periodically examined and found to be unable to stand trial *at that particular time*. In these circumstances, petitioner's presence may properly be assured by conditions on his right to bail, not only for purposes of trial but for court-ordered medical examinations which are necessarily preliminary to any future trial.

(*c*). While, as has been shown, the district courts have the constitutional authority to restrict the right to travel of a person free on bail, this authority must of course be exercised within the limits of proper discretion. In this case, unlike the situation in *Reynolds v. United States*, 80 S. Ct. at 32 (opinion of Mr. Justice Douglas as Circuit Justice), where the government was satisfied that the defendant would return from

Japan to Hawaii when required, the government strongly opposed the motion on the ground that granting it would severely endanger the insuring of petitioner's presence when required (R. 168–173, 189–192). Relevant to this contention were the nature and seriousness of the crime charged, the convictions and heavy sentences imposed upon petitioner's codefendants (see *Dennis* v. *United States*, *supra*), petitioner's position and activity in the Communist Party (see R. 222–496), and the countries which he desires to visit where he would be beyond the reach of enforceable process and extradition.[7]

Weighed against such considerations must be the showing made by petitioner of his need to travel. The district court found that petitioner did not make such a showing of the unavailability of medical facilities in the United States for his purposes and in his financial circumstances as to outweigh the government's interest in his continued presence in the jurisdiction. We submit that the balance struck by the district court, and upheld by the court of appeals, was correct and was well within the bounds of its discretion.

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[7] The United States is not a party to any extradition treaty with the U.S.S.R. *Department of State, Treaties in Force on January 1, 1959*, pp. 164–165, 199. The extradition treaty between the United States and Czechoslovakia does not apply to the crimes with which petitioner is charged. Treaty of July 2, 1925, 44 Stat. 2367, amended, 49 Stat. 3253. Thus, petitioner would not be subject to enforceable process in those countries. See *Eisler* v. *United States*, 338 U.S. 189; *Stern* v. *United States*, 249 F. 2d 720 (C.A. 2), certiorari denied, 357 U.S. 919.

CONCLUSION

For the foregoing reasons, it is submitted that the petition for a writ of certiorari should be denied.

In the event this petition is denied, the Government intends promptly to take appropriate action in the district court to determine whether the petitioner now is in physical condition to stand trial and, if not, what is the likelihood that he can be tried. The Government will attempt to make sure that court-appointed doctors make such thorough examination as is necessary in order that the Government and the courts can make the proper disposition of the issues in this case.

Respectfully submitted.

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SEPTEMBER 1960.

APPENDIX

MARCH 16, 1959.

Miss MARY M. KAUFMAN,
Attorney at Law,
185 Hall Street,
Brooklyn 5, New York.

DEAR MISS KAUFMAN: The Attorney General has asked me to answer the letter which you addressed to him on February 28, 1959, concerning Communist Party leader William Z. Foster.

On July 20, 1948, Foster was charged by a grand jury in the Southern District of New York in two separate indictments with conspiring to organize as the Communist Party a group dedicated to the violent overthrow of the United States Government, with conspiring to teach and advocate the overthrow of the Government by force and violence, and with membership in an organization dedicated to that purpose, namely, the Communist Party of the United States. At that time Foster was Chairman of the Communist Party and its leading functionary in this country. In October, 1949, eleven other members of the National Board of the Communist Party, named as codefendants with Foster in the conspiracy indictment, were convicted and subsequently their convictions were affirmed by the Supreme Court of the United States in *Dennis* v. *United States*, 341 U.S. 494 (1951).

Although the Government has been precluded from bringing Foster to trial solely for reasons of health, there has been and continues to be available abundant

evidence to substantiate the charges contained in these indictments. Further, as Chairman Emeritus of the Communist Party, Foster today through his writings and pronouncements continues to influence Party policy and activities.

For the foregoing reasons, the Government will persist in its efforts to bring Foster to trial as soon as his health will permit and will oppose vigorously any attempt on his part to have the charges dismissed or to leave the jurisdiction for the purpose of visiting the Soviet Union.

Sincerely,

/s/ J. WALTER YEAGLEY,
Acting Assistant Attorney General,
Internal Security Division.